

Comment

De Novo Review in Reverse Freedom of Information Act Suits

I. INTRODUCTION

The Freedom of Information Act¹ (FOIA) was enacted in 1966 to create legislatively a public right of access to records held by the federal government. The policy underlying the FOIA was “to ensure an informed citizenry . . . needed to check against corruption and to hold the governors accountable to the governed.”² At first, the FOIA was used primarily by newspapers to gain access to government documents containing newsworthy information, such as the extent to which the White House may have used the Federal Bureau of Investigation to obtain derogatory information about political opponents³ or the records of investigations by the National Highway Traffic Safety Administration into safety defects in new automobiles.⁴ Other groups soon uncovered a different use of the FOIA—what one commentator has described as “industrial espionage.”⁵ A number of businesses discovered that they could submit FOIA requests to government agencies that hold records and data acquired from other businesses in the same industry.⁶ These records and data often contained valuable commercial intelligence that would otherwise have been unobtainable. Although Congress anticipated this problem and included in the FOIA a way for agencies to decline to release confidential commercial information,⁷ the FOIA mandate opening agency records to public inspection required that the agency not be *compelled* to withhold such information.

While the extent to which businesses actually have suffered from the discretionary power of agencies to withhold or release confidential commercial information

1. 5 U.S.C. § 552 (1988).

2. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978). During the Senate debates on the 1974 FOIA amendments, Senator Kennedy observed:

The processes of Government touch almost every aspect of our lives, every day. From the food we eat to the cars we drive to the air we breathe, Federal agencies constantly monitor and regulate and control . . . The Freedom of Information Act guarantees citizen access to Government information and provides the key for unlocking the doors to a vast storeroom of information.

Connelly, *Secrets and Smokescreens: A Legal and Economic Analysis of Governmental Disclosures of Business Data*, 1981 Wis. L. Rev. 207 (quoting 120 CONG. REC. 17,015 (1974)).

3. *FBI v. Abramson*, 456 U.S. 615, 618 (1982).

4. *Ditlow v. Volpe*, 362 F. Supp. 1321, 1322 (D.D.C. 1973), *rev'd sub nom. Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974).

5. Note, *Protecting Confidential Business Information from Federal Agency Disclosure After Chrysler Corp. v. Brown*, 80 COLUM. L. REV. 109, 113 (1980).

6. See W. CASEY, J. MARTINSEN & L. MOSS, *ENTREPRENEURSHIP, PRODUCTIVITY, AND THE FREEDOM OF INFORMATION ACT* 25 (1983) [hereinafter *ENTREPRENEURSHIP*]; see, e.g., *Mead Data Cent., Inc. v. United States Dept. of Air Force*, 566 F.2d 242, 248 (D.C. Cir. 1977) (request for documents relating to licensing agreement between Air Force and requester's competitor covering computerized legal research system); *Wine Hobby U.S.A., Inc. IRS*, 502 F.2d 133, 134 (3d Cir. 1974) (request for list of persons registered as amateur winemakers so that requester could mail catalogs to them); *Timken Co. v. United States Customs Serv.*, 491 F. Supp. 557, 558 (D.D.C. 1980) (request for documents giving appraised value of imported roller bearings and components).

7. See *infra* notes 40–66 and accompanying text.

remains unclear,⁸ many businesses perceive themselves as victims.⁹ Moreover, these businesses have devised a form of lawsuit not contemplated by the drafters of the FOIA—the “reverse FOIA” action. In a reverse FOIA action, private businesses that submit information to federal agencies (submitters) seek to enjoin an agency from disclosing the submitters’ information to third-party requesters. The courts have allowed these reverse FOIA suits with the justification that there is an implied private right of action under the statute.¹⁰ However, the courts have failed to resolve some major problems left open by the few Supreme Court decisions in this area. The most troublesome problem is determining the proper scope of review when a federal court considers an agency’s decision to disclose information which the submitter insists should be withheld.¹¹

This Comment will address this problem and recommend the proper scope of review. First, the Comment will briefly examine the general structure of the FOIA and the standards applicable to requesters of information. Next, it will move beyond the relationship between the agency and the requester and consider how and why submitters have fought for—and acquired—some substantive and procedural protection of their information. The Comment will then discuss the use of the *de novo* standard of review by some courts. Finally, it will argue that absent an amendment by Congress to the FOIA, such a rigorous standard is contrary to prior Supreme Court interpretations of the Administrative Procedure Act.¹²

II. GENERAL STRUCTURE OF THE FOIA

A. Historical Background

The Freedom of Information Act was first enacted in 1966¹³ to amend section 3 of the Administrative Procedure Act (APA) of 1946.¹⁴ In Congress’ view, the Administrative Procedure Act had failed to require sufficient disclosure of information

8. See *ENTREPRENEURSHIP*, *supra* note 6, at 47–86 (empirical study of FOIA requests). Agencies receiving large numbers of FOIA requests—the Consumer Product Safety Commission, the Food and Drug Administration (FDA), the Environmental Protection Agency (EPA), and the Federal Reserve Board—collected the most commercially valuable information. *See id.* at 63–66. For instance, the EPA and the FDA collect valuable information on process technologies and chemical formulas in performing their regulatory functions. *See id.* at 87.

9. See *ENTREPRENEURSHIP*, *supra* note 6, at 88–89 (citing incident in which Proctor & Gamble submitted trade secret information about an odor-masking agent for sterilized medical products; the report containing trade secret information was inadvertently mailed to a competitor even though the company had provided the FDA with an abbreviated report for public disclosure). *But see* Connelly, *supra* note 2, at 209 (claiming that such perceptions are “based on highly impressionistic assessments rather than upon systematic analysis of who is trying to find out what under the FOIA”).

10. *See infra* note 75.

11. See Stevenson, *Protecting Business Secrets Under the Freedom of Information Act: Managing Exemption 4*, 34 ADMIN. L. REV. 207, 251 (1982).

12. Administrative Procedure Act of 1946, 5 U.S.C. §§ 551–559 (1988).

13. Government Information—Public Access, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552 (1988)). The text of the original Act is reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS (80 Stat.) 282 and the legislative history is reprinted *id.* at 2418.

14. Administrative Procedure Act, ch. 324, § 3, 60 Stat. 238 (1946) (originally codified at 5 U.S.C. § 1002 and now codified as amended at 5 U.S.C. § 552 (1988)). For an exhaustive study of foreign public disclosure acts, see Relyea, *Business, Trade Secrets, and Information Access Policy Developments in Other Countries: An Overview*, 34 ADMIN. L. REV. 315 (1982).

held by federal agencies.¹⁵ Although a right of public access to agency records is not mandated expressly by the Constitution, the legislative history of the FOIA recognized the importance of this right to the underlying philosophy of the Constitution: "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies."¹⁶

The FOIA has undergone many amendments, most notably in 1974, when Congress acted to prevent agencies from stalling in response to FOIA requests by imposing mandatory time limits in which agencies must respond to these requests.¹⁷ Throughout its twenty-four-year history, the guiding theme of the FOIA has been the disclosure of information.¹⁸

B. Structure of FOIA

The expansive nature of the FOIA's right of access to agency records is clear from the language of the Act. In addition to the general obligations placed on agencies to publish information about their official activities in the *Federal Register*,¹⁹ the Act also mandates that "each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules . . . shall make the records promptly available to any person."²⁰ The term "person" is defined in the Administrative Procedure Act to include "an individual, partnership, corporation, association, or public or private organization other than an agency."²¹ Courts have held that neither the identity nor the motives of the requester is relevant for the purpose of determining that person's right to request information under the FOIA.²² In short, a key feature of the FOIA is that literally

15. Section 3(c) of the APA of 1946 provided as follows: "PUBLIC RECORDS.— Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." *Id.* The legislative history of the Act commented that:

The public-information provisions of section 3 are of the broadest application because, while some functions and some operations may not lend themselves to formal procedure, all administrative operations should as a matter of policy be disclosed to the public except as secrecy may obviously be required or only internal agency "housekeeping" arrangements may be involved.

H.R. REP. NO. 1980, 79th Cong., 2d Sess., reprinted in 1946 U.S. CODE CONG. SERV. 1195, 1206 [hereinafter H.R. REP. 1980].

For discussions of the drawbacks of APA § 3, see, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979); *EPA v. Mink*, 410 U.S. 73, 79–80 (1973); H.R. REP. NO. 1497, 89th Cong., 2d Sess. 1, reprinted in 1966 U.S. CODE CONG. & ADMIN. NEWS 2418 [hereinafter H.R. REP. 1497]; J. O'REILLY, *FEDERAL INFORMATION DISCLOSURE: PROCEDURES, FORMS, AND THE LAW* § 2.02 (1989).

16. H.R. REP. 1497, *supra* note 15, at 2429. The same public policy underlies some foreign public disclosure statutes as well. For example, Sweden has had a statutory right of public access to government records since 1766. See Relyea, *supra* note 14, at 320. This statute, the Freedom of the Press Act, mandates that "[t]o further free interchange of opinions and enlightenment of the public every Swedish national shall have free access to official documents." *Id.* (citation omitted).

17. See *infra* notes 22–24 and accompanying text.

18. See *Chrysler*, 441 U.S. at 292.

19. 5 U.S.C. § 552(a)(1)–(2) (1988).

20. 5 U.S.C. § 552(a)(3) (1988).

21. 5 U.S.C. § 551(2) (1988).

22. Thus, acquiring standing in FOIA litigation is rarely a problem for the requester. One court commented that "there is no statutory bar to the military attache of the Soviet embassy filing FOIA requests for information from the CIA and the FBI on the same basis as a United States citizen." *Military Audit Project v. Casey*, 656 F.2d 724, 730–31 n.11 (D.C. Cir. 1981). However, the same court also emphasized that a "nonexistent entity concocted out of thin air" might

anyone can simply send a request letter of the appropriate department of an agency and thereby institute an FOIA proceeding.

Moreover, the FOIA requires that each agency initially respond to a request for information within ten days of receipt of the request by either granting access to the information or explaining why the agency will not disclose the information.²³ If the agency denies disclosure and the requester appeals the decision through the appropriate agency channels, then the agency must rule on the appeal within twenty days of receiving the request for an appeal.²⁴ Although these time constraints impose a severe burden on many agencies both in terms of employee resources and interference with other agency work, the 1974 amendments establishing these limits have never been modified or repealed.

The FOIA provides for some leeway to alleviate the cost to the agency of responding to requests in such a short time. First, the agency may extend these time limits for up to ten days upon written notice to the requester, provided that certain "unusual circumstances"²⁵ exist. The term "unusual circumstances" is only loosely defined in the statute and thus gives the agency added flexibility. Second, these time limits can be extended provided that the agency is "exercising due diligence" in responding to the request.²⁶ This exception is obviously designed to allow the agency a reasonable amount of time to compile and copy large quantities of data or other records.

If the agency fails to disclose the requested records within these time constraints or, more typically, if the agency refuses to disclose them to the requester on the theory that the records are exempt from disclosure, the requester is then granted the right to a de novo determination by a federal district court as to whether the agency properly withheld the records.²⁷ The requester has an immediate accrual of a cause of action "in the interests of timely disclosure"²⁸ from the agency. In such a proceeding, the standard of review under the APA is whether the agency's action in not disclosing the record is "unwarranted by the facts."²⁹ The court is permitted to go beyond any administrative record established in the prior proceedings within the agency (for example, the findings of the agency and any documents or comments submitted by the requester) and make independent findings of fact.³⁰ De novo review,

lack standing and that a lawyer is obligated to know something about his client because "what he says to the court . . . often implicitly are representations about his client's position and existence." *Id.* Thus, Fed. R. Civ. P. 11 might authorize sanctions against an attorney who represents an organization in an FOIA suit if the organization is in reality a "nonexistent entity" fabricated by the client.

For a detailed discussion of the scope of standing requirements in FOIA litigation, see Annotation, *Who Has Standing to Seek Access to Agency Information Under Freedom of Information Act*, 82 A.L.R. 2d 248 (1987). See also J. O'REILLY, *supra* note 15, at §§ 5.04, 8.07.

23. 5 U.S.C. § 552(a)(6)(A)(i) (1988).

24. 5 U.S.C. § 552(a)(6)(A)(ii) (1988).

25. 5 U.S.C. § 552(a)(6)(B) (1988).

26. 5 U.S.C. § 552(a)(6)(C) (1988).

27. 5 U.S.C. § 552(a)(4)(B) (1988). These statutory time limits provide for "constructive exhaustion" of administrative remedies within the agency. See *Spannaus v. United States*, 824 F.2d 52, 58 (D.C. Cir. 1987).

28. *Spannaus*, 824 F.2d at 58. See also 5 U.S.C. § 552(a)(6)(C) (1988).

29. 5 U.S.C. § 706(2)(F) (1988).

30. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971); see also 5 K. DAVIS,

in effect, is the strictest scrutiny possible by a court reviewing an administrative proceeding because it allows the court to disregard the agency's factual findings and start the review process anew.

C. Requesters' Rights: *In Sum*

The FOIA grants requesters of agency records substantial rights to fulfill the policy of encouraging agencies to disclose information. A more in-depth analysis of the procedure for making an FOIA request is beyond the scope of this Comment.³¹ For purposes of this Comment, there are three important observations to be made regarding the relationship between agencies and requesters. First, the FOIA represents a policy choice to place requesters' interests above those of the agencies, even though this often channels agency resources away from their primary purposes of promulgating and enforcing regulations and making adjudications. Second, any person can request agency records, regardless of his or her intended use of the information, and the agency is obligated to respond in a timely manner. Third, Congress has explicitly granted requesters a right to de novo judicial review of any adverse decisions by the agency regarding their request. Congress rarely provides for such an expansive scope of review by the courts. In the case of agency refusals to disclose records, however, Congress has determined that the courts should have considerable power to question agency discretion.

III. REVERSE FOIA SUITS

A. Submitters' Concerns

The parties affected by the FOIA are not limited to the agency and the requester. Federal agencies collect increasing amounts of information from those they regulate through a variety of methods including license applications, bids for government contracts, enforcement of agency regulations, and continuous monitoring of economic activity.³² Some firms voluntarily submit this information because they want a government contract while others are forced to submit it because the agency's regulations require the submission. Regardless of whether the submission is made voluntarily or involuntarily, many submitters of records and data are concerned about what happens to this information when a third party requests the agency to disclose it under the FOIA.³³ Because these third parties may include competing foreign

ADMINISTRATIVE LAW TREATISE § 29.4 (2d ed. 1984); L. MODJESKA, *ADMINISTRATIVE LAW: PRACTICE AND PROCEDURE* § 6.14 (1982).

31. For more in-depth discussions of FOIA suits, see generally A. ADLER, *LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT* (10th ed. 1985); ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, *FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK* § 10 (1985); NEW YORK LAW JOURNAL, *OBTAINING ACCESS TO GOVERNMENT RECORDS AND PROTECTING THE CONFIDENTIALITY OF CORPORATE RECORDS* (1979); J. O'REILLY, *supra* note 15; J. ROSENFELD, *THE FREEDOM OF INFORMATION ACT: BUSINESS USES* (BNA Corporate Practice Series No. 14, 1985); Annotation, *Scope of Review Under Freedom of Information Act* (5 U.S.C. § 522(a)(3)), of *Administrative Agency's Withholding of Records*, 7 A.L.R. FED. 876 (1971 & Supp. 1989).

32. See, e.g., *ENTREPRENEURSHIP*, *supra* note 6, at 47-86; Note, *supra* note 5, at 109.

33. In McGarity & Shapiro, *The Trade Secret Status of Health and Safety Testing Information: Reforming Agency*

businesses, the political significance of submitters' concerns encompasses both domestic and foreign policy.³⁴

When Congress amended section 3 of the Administrative Procedure Act to grant access to records to anyone and not just to "persons properly and directly concerned,"³⁵ it foresaw the potential for abuse of the FOIA to gain economically valuable confidential information to the detriment of parties having a justifiable expectation that the information would be used only by the agency to meet its needs. Congress was also concerned that the submitters would deprive agencies of information vital to fulfilling their regulatory mandate out of a distrust of the agencies' ability to keep the information secret.³⁶ Therefore, Congress included in the FOIA nine exemptions³⁷ representing its "determination of the types of information that the executive branch must have the option to keep confidential if it chooses."³⁸ The exemption relevant to this Comment is Exemption 4, which provides that disclosure is not required if the information sought consists of "trade secrets and commercial or financial information obtained from a person and privileged or confidential."³⁹

B. Exemption 4

Exemption 4 applies to two categories of submitted information: (1) trade secrets; or (2) information that is (a) commercial or financial, (b) obtained from a

Disclosure Policies, 93 HARV. L. REV. 837, 849-50 (1980), the authors note the usefulness of safety testing data acquired by a competitor through the use of the FOIA. For instance, the data could be used by a competitor in support of its application to a regulatory agency for approval of an equivalent product, thereby depriving the submitting firm, which conducted the testing, of substantial lead time in obtaining approval that the firm could use to recoup the cost of the testing. *Id.* at 849 & n.59. The authors decline to address the issue of whether the submitter had a *right* to recoup this cost by charging noncompetitive prices. They suggest, though, that a competitor might use this testing data to obtain foreign licenses to market competing products abroad. *Id.* at 849-50. If true, this would pose a potentially serious risk of substantial competitive harm to the submitter.

See also O'Reilly, *Knowledge Is Power: Legislative Control of Drug Industry Trade Secrets*, 54 U. CIN. L. REV. 1, 3 (1985) [hereinafter O'Reilly, *Knowledge*]. The author notes that innovative drug manufacturers that create new drugs often have difficulty recouping the cost of researching and developing these products when generic drug manufacturers obtain testing data submitted to the FDA by the innovator through an FOIA request. Use of this data by generic drug manufacturers when applying for regulatory licenses lowers market entry barriers to the generic drug firms because they can forego expensive trial-and-error testing. *Id.*

34. Echoing recent demands for protection of American industry from allegedly unfair foreign competitive practices, one commentator asserted that the budget allocated for processing FOIA requests "was subsidizing Swedish ball bearing makers . . . and French aviation firms." O'Reilly, *Regaining a Confidence: Protection of Business Confidential Data Through Reform of the Freedom of Information Act*, 34 ADMIN. L. REV. 263, 264 (1982) [hereinafter O'Reilly, *Confidence*].

35. H.R. REP. 1980, *supra* note 15.

36. H.R. REP. 1497, *supra* note 15. Although the House report accurately reflects a legislative intent to protect commercial information submitted to agencies in certain circumstances, it does not represent the "true" legislative history because the report was written *after* the Senate passed the bill. Hence, the Senate report is the better general source of legislative history for the FOIA. See *Department of Air Force v. Rose*, 425 U.S. 352, 362-67 (1976).

37. 5 U.S.C. § 552(b) (1988).

38. *EPA v. Mink*, 410 U.S. 73, 80 (1973). While the executive branch retains some discretion to determine the type of information it keeps confidential, the broad agency discretion endorsed in this decision has been limited by congressional adoption of a statute, 5 U.S.C. § 552(a)(4)(B) (1988), that narrows this exemption. *Phillipi v. CIA*, 546 F.2d 1009, 1011 n.4 (D.C. Cir. 1976). See also *National Parks & Conserv. Ass'n v. Morton*, 498 F.2d 765, 767 (D.C. Cir. 1974) (purposes of the FOIA include protecting persons submitting information to government agencies).

39. 5 U.S.C. § 552(b)(4) (1988).

person,⁴⁰ and (c) privileged or confidential.⁴¹ Unfortunately, Congress did not define any of these terms in either the FOIA or the Administrative Procedure Act.

1. Trade Secrets

When the courts first wrestled with the general concept of "trade secrets," they tended to adopt the definition of "trade secret" in the Restatement of Torts.⁴² More recently, other courts, led by the Circuit Court of Appeals for the District of Columbia, adopted a narrower definition because the Restatement version seemed to include almost everything.⁴³

The Supreme Court in *Ruckelshaus v. Monsanto Co.*⁴⁴ held that when submitted information is recognized as a trade secret property right under the law of the forum state, that information is property protected by the takings clause of the fifth amendment.⁴⁵ In *Monsanto*, the Environmental Protection Agency (EPA) was authorized under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)⁴⁶ to use data acquired from companies to evaluate the applications of such companies for federal registration of their products under this Act.⁴⁷ The Act also authorized the EPA to disclose to the public any information it acquired under the Act, unless the

40. See 5 U.S.C. § 551(2) (1988).

41. See *National Parks*, 498 F.2d at 766.

42. A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. . . . A trade secret is a process or device for continuous use in the operation of the business.

RESTATEMENT OF TORTS § 757 comment b (1939).

However, the Restatement (Second) of Torts deleted this and other related sections because they no longer rely on traditional principles of tort law. 4 RESTATEMENT (SECOND) OF TORTS 1 (1977). The Uniform Trade Secrets Act of 1979 was intended to fill this gap. To date, approximately half of the states have adopted it. 14 U.L.A. 369 (Supp. 1989). The Uniform Trade Secrets Act provides that:

"Trade Secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

UNIF. TRADE SECRETS ACT, 14 U.L.A. 541, 542 (1979). See also *Peabody v. Norfolk*, 98 Mass. 452, 457 (1868) (landmark case declaring "[i]t is the policy of the law, for the advantage of the public, to encourage and protect invention and commercial enterprise"). See generally Annotation, *Disclosure of Trade Secret as Abandonment of Secrecy*, 92 A.L.R.3d 138 (1979).

43. Compare *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 474-75 (1974) (noting that Ohio, like many other states, has adopted the Restatement definition of "trade secret") with *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983) (adopting a narrow definition of "trade secret" in the FOIA after finding no support for the proposition that Congress intended a broader definition: "we define trade secret . . . as a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort").

44. 467 U.S. 986 (1984).

45. *Id.* at 1000-04. See generally Comment, *Federal Disclosure Statutes and the Fifth Amendment: The New Status of Trade Secrets*, 54 U. CHI. L. REV. 334 (1987) (discussing the impact of *Monsanto*). The protection of trade secrets was relegated to state law when the Supreme Court declared: "There is no federal general common law." *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). See generally C. WRIGHT, LAW OF FEDERAL COURTS § 60 (4th ed. 1983).

46. 7 U.S.C. § 136 (1988).

47. See *Monsanto*, 467 U.S. at 990-93. FIFRA required all manufacturers of insecticides, fungicides, and rodenticides to register their products prior to sale in interstate or foreign commerce. FIFRA, as amended, regulated the use, sale, and labelling of these products. Congress enacted FIFRA to address public concern regarding the safety of these products and the products' adverse effects on the environment. *Id.*

company designated the information as a "trade secret" in advance.⁴⁸ However, such designations were not binding on the EPA; the EPA could challenge the company's classification. In turn, the company could institute a declaratory judgment action in federal district court to enjoin the EPA from disclosing the information.⁴⁹

Monsanto brought a declaratory judgment action to enjoin the EPA from making any future disclosures under FIFRA.⁵⁰ Monsanto alleged that the disclosure provisions of the Act effected a taking of its valuable commercial property without just compensation and that the taking was for a private use because Monsanto's competitors could acquire its trade secrets.⁵¹ The Supreme Court looked to the law of Missouri, the forum state, which had adopted the definition of "trade secrets" suggested by the Restatement of Torts section 757.⁵² The Supreme Court then held that Missouri law granted a property right in trade secrets.⁵³

The *Monsanto* case did not involve the FOIA, but it did state that submitters of data which constitute intangible property protected by state law deserved protection under the takings clause of the fifth amendment.⁵⁴ Accordingly, if an agency exercises its discretion to release information to a requester when this information is protected by the forum state's trade secret law, this disclosure might constitute a taking in violation of the submitter's fifth amendment rights,⁵⁵ unless the government can show that the taking was for a public use.⁵⁶

A strong case can be made for denying fifth amendment protection to most businesses that submit commercial information to the federal government. The Court in *Monsanto* noted that

as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration [with the EPA] can hardly be called a taking.⁵⁷

Forced disclosure of commercial information required by an agency to fulfill its mandate should survive a takings claim as a reasonable regulation of interstate commerce. If the agency later misuses this information by disclosing it illegally (for

48. *Id.* at 992.

49. *Id.*

50. *Id.* at 998-99.

51. *Id.*

52. *Id.* at 1001; see *supra* note 42.

53. *Ruckelshaus v. Monsanto Corp.*, 467 U.S. 986, 1001-04 (1984).

54. *Id.* at 1003-04.

55. *Id.* at 1004-14. See also Comment, *supra* note 45, at 358-59.

56. See *Monsanto*, 467 U.S. at 1014-19. The Court noted that Congress apparently intended that the EPA's use of data collected pursuant to FIFRA either did not constitute a fifth amendment taking or that the Tucker Act, 28 U.S.C. § 1491 (1982) (granting exclusive jurisdiction to the U.S. Claims Courts for suits against the United States government that are "founded . . . upon the Constitution"), was a sufficient remedy should a taking occur. *Monsanto*, 467 U.S. at 1019. Thus, a district court would lack jurisdiction in equity to enjoin a taking under these circumstances. See *id.*; see generally 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3657 (1985).

57. *Monsanto* 467 U.S. at 1007. See *infra* notes 130-32 and accompanying text for discussion of submitters' procedural due process rights.

example, in violation of state trade secret law), then the submitter can seek just compensation through the Tucker Act.⁵⁸

2. Other Information

When interpreting the terms "commercial" and "financial" for purposes of the FOIA Exemption 4,⁵⁹ courts have consistently held that these terms should be given their ordinary meanings.⁶⁰ In general, few businesses have had any problem establishing that their information fits into one of these two categories, although employment lists created some interpretative problems until *Chrysler Corp. v. Brown*.⁶¹

The term "confidential" has generated considerably more litigation. Courts now follow an objective test: Information is "confidential" if its disclosure would be likely to either (1) "impair the Government's ability to obtain necessary information in the future;" or (2) "cause substantial harm to the competitive position of the person from whom the information was obtained."⁶² Under the second prong of the test, the parties opposing disclosure need not "show actual competitive harm"; rather, it is sufficient that they show some evidence of both "[a]ctual competition and the likelihood of substantial competitive injury."⁶³ The court must also look at the cost to requesters of acquiring the information sought from sources other than the disclosing agency.⁶⁴

"Privileged" information is any financial or commercial information that would customarily be subject to one of the traditional privileges, such as doctor-patient, attorney-client, or lender-borrower.⁶⁵ Few agencies have relied heavily on this element of Exemption 4 because another exemption, Exemption 6, applies to certain privileges as well. Exemption 6 provides that disclosure is not required if the information sought consists of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁶⁶

58. See *supra* note 56. See also McGarity & Shapiro, *supra* note 33, at 862 (suggesting that a less rigorous definition of trade secrets should apply in the "public law context of information submitted to government agencies").

59. See *supra* note 39.

60. See *Washington Post Co. v. United States Dep't of Health & Human Servs.*, 690 F.2d 252, 266 (D.C. Cir. 1982), *rev'd on other grounds*, 795 F.2d 205 (D.C. Cir. 1986); *Board of Trade v. Commodity Futures Trading Comm'n*, 627 F.2d 392, 403 & n.78 (D.C. Cir. 1980).

61. 441 U.S. 281 (1979). See *infra* notes 77-83 and accompanying text. Most requests for employment lists or "manning tables" have been by public interest groups seeking to determine a company's equal opportunity hiring performances, suggesting that no real commercial significance attaches to this data. See *ENTREPRENEURSHIP*, *supra* note 6, at 97.

62. *National Parks & Conserv. Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (footnote omitted).

63. *Gulf & Western Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979). No likelihood of competitive harm was shown by a company seeking to enjoin the Secretary of the Army from releasing a telephone directory of the munitions manufacturer's plant personnel at an Army base when the directory had been prepared by the company at government expense and for government use. *Hercules, Inc. v. Marsh*, 839 F.2d 1027 (4th Cir. 1988). The court affirmed that deleting the home telephone numbers of key personnel was sufficient protection. *Id.* at 1028.

In addition, the courts need not conduct a sophisticated economic analysis of the likely effects of disclosure. See *National Parks & Conserv. Ass'n v. Kleppe*, 547 F.2d 673, 681 & n.24 (D.C. Cir. 1976).

64. *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 51 (D.C. Cir. 1981).

65. H.R. REP. 1497, *supra* note 15, at 10; see also *Department of Air Force v. Rose*, 425 U.S. 352, 362-67 (1976).

66. 5 U.S.C. § 552(b)(6) (1988). See also J. O'REILLY, *supra* note 15, § 14.09.

C. *Litigation of Reverse FOIA Suits*

1. *Lack of Substantive Protection of Submitters*

The language of Exemption 4 and the tests articulated by the courts suggest that businesses are granted broad protection from disclosure of their confidential commercial information which is submitted to agencies. However, it must be stressed that the FOIA does not *compel* an agency to withhold documents falling within Exemption 4; to the contrary, the Act authorizes the agency to disclose the information despite the submitters' requests for confidentiality if the agency determines that the submitters' interests in confidentiality are outweighed by the public's interest in disclosure. The FOIA is a disclosure statute. An agency acts within the clear bounds of its discretion if it chooses to disclose information that would otherwise fall within one of the nine exemptions.⁶⁷

Thus, the agencies retain substantial power to determine the confidentiality of the submitter's information. As the Supreme Court has noted: "[T]he congressional concern was with the *agency's* need or preference for confidentiality; the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information."⁶⁸ Even if the agency, pursuant to a presubmission confidentiality agreement,⁶⁹ was to classify the submit-

67. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 291 (1979).

68. *Id.* at 292-93.

69. Many federal agencies have promulgated regulations that allow submitters to request confidential treatment of all or a portion of their information at the time they submit it. *See, e.g.*, 26 C.F.R. § 601.702(h)(4)(ii) (1989) (IRS); 12 C.F.R. § 261.17(a) (1989) (Federal Reserve Board (FRB)); 15 C.F.R. § 4.10(f) (1989) (Federal Trade Comm'n); 16 C.F.R. § 1015.18(c) (1989) (Consumer Prod. Safety Comm'n); 17 C.F.R. § 145.9(d) (1989) (Commodity Futures Trading Comm'n); 17 C.F.R. § 200.83(f) (1989) (SEC); 19 C.F.R. § 201.6 (1989) (U.S. Int'l Trade Comm'n); 21 C.F.R. § 20.44 (1989) (FDA); 40 C.F.R. § 2.203(b) (1988) (EPA); 47 C.F.R. § 0.459 (1988) (FCC); 49 C.F.R. § 1001.5(c)(1)(i) (1988) (Interstate Commerce Comm'n (ICC)).

All executive branch agencies are now required to establish predisclosure notification procedures whenever a request is made for information that is arguably exempt from disclosure under Exemption 4. *See* Executive Order No. 12,600, 52 Fed. Reg. 23,781 (1987), *reprinted in* 5 U.S.C.A. § 552 (West Supp. 1989). Generally the agency regulations grant a submitter up to 15 days after receipt of a predisclosure notice to justify continued confidential treatment of its submitted information. *See, e.g.*, 26 C.F.R. § 601.702(h)(5) (1989) (IRS; 10 work days); 12 C.F.R. § 261.17(b)(3) (1989) (FRB; 10 work days); 15 C.F.R. § 4.7(e) (1989) (Dept. of Commerce; 7 work days); 17 C.F.R. § 200.83(d)(1) (1989) (SEC; 10 calendar days); 19 C.F.R. § 201.20(f) (1989) (U.S. Int'l Trade Comm'n; at least one work day before the Trade Commission must respond to the FOIA request); 40 C.F.R. § 2.204(e)(2) (1988) (EPA; 15 work days); 49 C.F.R. § 1001.5(d)(1) (1988) (ICC; 10 work days).

These regulations generally require the agency to consider carefully the submitter's objections and grounds for nondisclosure prior to determining whether or not to disclose the requested information. *See, e.g.*, 26 C.F.R. § 601.702(h)(6) (1989) (IRS must "consider carefully" objections and state reasons for not sustaining them); 12 C.F.R. § 261.17(d) (1989) (FRB must give reasons for intended disclosure); 15 C.F.R. § 4.7(f) (1989) (Dept. of Commerce must "carefully consider" objections and state reasons for not sustaining them); 17 C.F.R. § 200.83(e) (1989) (administrative appeal procedures established within SEC to handle denials of confidential treatment); 19 C.F.R. § 201.19(g) (1989) (U.S. Int'l Trade Comm'n; same as IRS); 40 C.F.R. § 2.205(f)(2) (1988) (EPA must state basis for denial of confidential treatment); 49 C.F.R. § 1001.5(e) (1988) (ICC; same as IRS).

If the agency decides to disclose this information, these regulations afford the submitter a period of time after receiving notice of the agency's intent to disclose during which the submitter may petition a court for a stay or other judicial remedy. *See, e.g.*, 26 C.F.R. § 601.702(h)(6)(iii) (1989) (IRS; 10 work days); 12 C.F.R. § 261.17(d) (1989) (FRB; 10 work days); 15 C.F.R. § 4.7(f)(3) (1989) (Dept. of Commerce; 7 work days); 17 C.F.R. § 200.83(e)(4) (1989) (SEC; 10 calendar days). The SEC regulation also provides for automatic stay of disclosure if the submitter notifies the agency that it is seeking federal judicial relief during this period. *Id.* at § 200.83(e)(5).; 19 C.F.R. § 201.9(g) (1989)

ter's information as confidential, courts have held that such a promise is not of itself sufficient to defeat subsequent agency disclosures.⁷⁰

Such comments by the courts understandably worry submitters.⁷¹ The FOIA was intended to increase public access to agency records under the rationale of encouraging open government.⁷² It is one thing to require public agencies such as the Federal Bureau of Investigation or the Central Intelligence Agency to disclose the contents of their files on certain individuals or official activities.⁷³ On the other hand, it seems unfair to subject private firms to the same standards as government agencies. It can even be argued that Congress intended the FOIA to reveal only "public actions, not private commercial actions that happened to be recorded in government application files."⁷⁴

Business submitters began to seek protection of their confidential commercial information by filing reverse FOIA suits.⁷⁵ Submitters would seek an injunction from a district court to enjoin an agency from disclosing the information. Although most courts found some basis to grant an injunction in clear cases of likely competitive harm,⁷⁶ the courts could not avoid the problem that the FOIA did not explicitly provide for reverse FOIA suits.

2. *The Chrysler Case*

The Supreme Court defined the scope of reverse FOIA suits in *Chrysler Corp. v. Brown*.⁷⁷ Chrysler had numerous government contracts and was therefore required to supply the Office of Federal Contract Compliance Programs (Compliance Office) and other agencies with "manning tables." These detailed analyses of Chrysler's labor force were used by the Compliance Office to ensure that Chrysler was providing nondiscriminatory employment opportunities.⁷⁸ The agency responsible for monitoring Chrysler's employment practices, the Department of Defense's Defense Logistics Agency, notified Chrysler that it had received an FOIA request for certain employment data submitted by Chrysler. When the Defense Logistics Agency determined that this data was not within the FOIA Exemption 4 or the Compliance Office's

(U.S. Int'l Trade Comm'n; "reasonable number of days prior to the specified disclosure date"); 40 C.F.R. § 2.205(f)(2) (1988) (EPA; 10 work days); 49 C.F.R. § 1001.5(e)(3)(1988) (ICC; 10 work days).

70. *Petkas v. Staats*, 501 F.2d 887, 889 (D.C. Cir. 1974).

71. See generally O'Reilly, *Confidence*, *supra* note 34, at 263.

72. See *supra* note 17 and accompanying text.

73. See, e.g., *Ely v. FBI*, 781 F.2d 1487 (11th Cir. 1986); *Phillipi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976) (request for information regarding allegedly covert use by CIA of the ship *Hughes Glomar Explorer*).

74. O'Reilly, *Knowledge*, *supra* note 33, at 8 n.38. O'Reilly quotes a statement by Assistant Attorney General Norbert Schlei before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary in 1964: "[N]ot only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system, private business information should be afforded appropriate protection." *Id.*

75. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979).

76. See, e.g., *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190, 1210 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977) (finding implied right of supplier of private information to invoke equity jurisdiction of courts to enjoin the disclosure of information within Exemption 4); *Charles River Park "A", Inc. v. Department of Hous. & Urban Dev.*, 519 F.2d 935, 943-44 (D.C. Cir. 1975) (affirming district court injunction against disclosure until administrative record is sufficient for trial court to determine whether disclosure is an abuse of discretion).

77. 441 U.S. 281 (1979).

78. *Chrysler*, 441 U.S. at 286. See *supra* note 61.

disclosure rules, Chrysler brought a reverse FOIA action to enjoin disclosure by the Defense Logistics Agency.⁷⁹

The Supreme Court in *Chrysler* held that the FOIA is exclusively a disclosure statute and does not afford submitters such as Chrysler any right to enjoin agency disclosure.⁸⁰ The Court also refused to find an implied private right of action under the Trade Secrets Act⁸¹ because that Act is a criminal statute and there was no basis for inferring that Congress had intended to create a private right of action under it.⁸² However, the Court did not thereby destroy the vitality of reverse FOIA actions because it also found a right to enjoin agency action under the Administrative Procedure Act, specifically APA section 706(2)(A).⁸³ This provision permitted Chrysler to seek an injunction against the agency's disclosure if disclosure would be "not in accordance with law"; that is, if it violated the Trade Secrets Act.

Because the Trade Secrets Act and the FOIA Exemption 4 are coextensive in scope,⁸⁴ it might also be possible to enjoin the agency from disclosing information within Exemption 4 as action "not in accordance with law." The Court rejected that argument because the Trade Secrets Act only prohibits disclosures "not authorized by law" and the agency had promulgated substantive rules permitting disclosure which had the force and effect of law.⁸⁵ Thus, as one commentator observed, "[a]gencies can . . . avoid the prohibition of section 1905 [of the Trade Secrets Act], and thus retain their discretion to disclose confidential business information, by promulgating binding rules that permit such disclosures."⁸⁶ If a court finds that the information falls within Exemption 4 (and therefore also the Trade Secrets Act), but the agency also has promulgated substantive rules authorizing it to disclose this information anyway, the disclosure is "authorized by law" and the agency cannot then be enjoined from disclosing the information.

The Court then turned to the issue of the proper scope of review by a district court when determining whether disclosure is "not in accordance with law" because it would violate the Trade Secrets Act. Section 706(2) of the Administrative Procedure Act provides that a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . [or] unwarranted by the facts to the extent

79. Chrysler, like other submitters of manning tables, feared that competitors might be able to use the tables to determine its labor costs, plans for expansion, and so forth. See, e.g., *Sears, Roebuck & Co. v. General Servs. Admin.*, 553 F.2d 1378 (D.C. Cir.), cert. denied, 434 U.S. 826 (1977).

80. *Chrysler*, 441 U.S. at 294. The Court focused on the legislative history of the FOIA and the Act's provision on judicial relief that did not give the district court authority to bar disclosure. See 5 U.S.C. § 552(a)(4)(B) (1988).

81. 18 U.S.C. § 1905 (1982). The Trade Secrets Act is a criminal statute forbidding any federal officer or employee from in any manner disclosing confidential commercial information obtained in the course of the employee's employment or official duties.

82. *Chrysler Corp. v. Brown*, 441 U.S. 281, 316-17 (1979).

83. *Id.* at 312-16, 318.

84. *Id.* at 319 n.49 ("Although there is a theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of § 1905 . . . that possibility is at most of limited practical significance in view of the similarity of language between Exemption 4 and . . . § 1905.").

85. *Id.* at 295.

86. Note, *supra* note 5, at 115.

that the facts are subject to trial de novo by the reviewing court.”⁸⁷ The Court declined to resolve this issue in *Chrysler* because the issue was not properly before the Court (the court of appeals had not reached it), but did comment that “[d]e novo review by the district court is *ordinarily* not necessary to decide whether a contemplated disclosure runs afoul of [section] 1905.”⁸⁸ The lower courts since then have been struggling to formulate a workable standard that balances the rights of submitters with Congress’ decision in the FOIA not to grant de novo review to submitters.

IV. DE NOVO REVIEW

A. *Scope of Review Under the APA*

When reviewing agency actions, the APA mandates that the “reviewing court shall . . . hold unlawful and set aside agency action[s], findings, and conclusions found” to violate one of six standards.⁸⁹ Two of the standards, the “substantial evidence” test of APA section 706(2)(E) and the “unwarranted by the facts” test of APA section 706(2)(F), require the reviewing court to consider the factual record that was before the agency when it made its decision. The abuse of discretion test (“arbitrary or capricious”) applies in all cases.⁹⁰ This standard requires that an agency’s decision be based on consideration of all the relevant factors and not be a clear error of judgment; however, under this narrow standard, the court “is not empowered to substitute its judgment for that of the agency.”⁹¹

Under the FOIA, the scope of review of an agency decision to withhold information from a requester is subject to de novo review because of an express statutory mandate.⁹² De novo review requires the reviewing court to reweigh the evidence compiled by the agency to determine whether the agency’s findings are correct, not just whether they are reasonable.⁹³ Because the FOIA is silent on reverse FOIA actions by submitters, the determination of the proper scope of review is more troublesome.

87. 5 U.S.C. § 706(2)(A) & (F) (1988).

88. *Chrysler Corp. v. Brown*, 441 U.S. 281, 318 (1979) (emphasis added).

89. 5 U.S.C. § 706 (1988). The text of the statute provides as follows:

[T]he reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

Id.

90. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971).

91. *Id.* at 416. *But see* Levin, *Scope of Review Doctrine Restated: An Administrative Law Section Report*, 38 ADMIN. L. REV. 239 (1986) (criticizing vague labels used in the APA and formulated by courts interpreting the APA’s scope of review provisions, and recommending several amendments to the APA).

92. *See supra* note 30 and accompanying text.

93. *See* 5 U.S.C. § 552(a)(4)(B) (1988); *see also supra* note 27 and accompanying text.

At the minimum, the agency action must withstand the abuse of discretion standard, of course, but many commentators and some courts have argued in favor of a de novo standard of review despite the lack of an express statutory authorization.⁹⁴

B. *Argument for De Novo Review*

The main problem with reverse FOIA suits is that there is little record of what occurred previously between the submitter and the agency when the suit finally arrives in the courtroom.⁹⁵ Typically, the submitter first receives a perfunctory notice from the agency (assuming that the agency provides such notice) stating that an FOIA request has been filed requesting disclosure of the submitter's information.⁹⁶ The submitter then has an opportunity to notify the agency if it asserts that some or all of the information falls within an exemption from disclosure. Due to the expedited nature of all FOIA requests,⁹⁷ the time interval involved is very short. Often the submitter and agency only exchange a few letters, perhaps three or four.⁹⁸ Confining judicial review to this administrative record, which would constitute the entire record in such an informal proceeding, would inhibit the reviewing court by denying it an opportunity to assess fully the potential harm to the submitter from disclosure.

An argument in favor of de novo review is that the agencies do not possess special expertise to resolve disputes over the classification of information the agencies collect. In general, unless Congress has explicitly provided otherwise, courts defer to an agency's exercise of discretion when the agency has some unique expertise in the area that laymen (and presumably judges) do not possess.⁹⁹ This deference occurs primarily when the agency's discretion requires the use of technical or complex determinations involving the reconciliation or balancing of particular policies.¹⁰⁰ The theory, in part, is that Congress created the agency for the purpose of exercising this discretion. In such instances, courts recognize that agencies possess some unique expertise in the area, grounded in both experience and sensitivity to political factors, which aids the agency in balancing competing interests.¹⁰¹ Furthermore, it can perhaps be inferred that Congress, by enacting the FOIA and adopting stringent constraints on agency discretion to withhold information, assumed that agencies would be more likely to err in favor of withholding.¹⁰² Thus, an automatic mechanism may exist to safeguard submitters' interests.

Many agencies making FOIA disclosure decisions have worked with the sub-

94. See generally O'Reilly, *Confidence*, *supra* note 34. In general, only "constitutional fact" issues, that is, mixed questions of constitutional law and fact, merit de novo review by a court. See Dickinson, Crowell & Benson, *Judicial Review of Administrative Determinations of Questions of "Constitutional Fact,"* 80 U. PA. L. REV. 1055 (1932); see also 5 K. DAVIS, *supra* note 30, at § 29.23.

95. See O'Reilly, *Confidence*, *supra* note 34, at 308-11.

96. *Id.* at 299.

97. See *supra* notes 23-30 and accompanying text.

98. See O'Reilly, *Confidence*, *supra* note 34, at 299.

99. See generally *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

100. See *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

101. *Id.*

102. Judge Wald noted that prior to the 1974 amendments to the FOIA, so many agencies refused to disclose records that the FOIA was viewed by some as a paper tiger. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 658 (1984).

mitters for years and are sufficiently familiar with the nature of the information involved that they can distinguish between genuine cases of likely competitive harm and mere unsubstantiated claims of potential harm. Therefore, the courts should defer to the more experienced agencies if for no other reason than judicial economy. In reality, however, some agencies may lack the expertise which validates judicial deference to administrative discretion. The argument that federal agencies have greater expertise in evaluating the confidentiality of information is weakened when one considers that those who handle FOIA requests do not necessarily have any expertise in either the technical or the legal aspects of the information disclosure.¹⁰³ In addition, Congress generally does not allot budgetary appropriations specifically for use in FOIA programs, so that much of the funding for responses to FOIA requests comes from the agencies' overall budgets.¹⁰⁴ Of course, this creates an incentive for agency personnel handling FOIA requests to minimize the financial and time costs of processing FOIA requests by using any means possible.¹⁰⁵

In addition, FOIA exemption decisions in which the agency determines whether the submitters' claimed need for protection is valid in terms of Exemption 4 or the Trade Secrets Act are equivalent to informal adjudications.¹⁰⁶ Thus, the agency must interpret the statutory provisions of the FOIA, a function that courts are certainly just as competent to perform.¹⁰⁷ Because the agency's decision to disclose ultimately affects the legal rights of the individual submitter, it seems odd to assert that the agency is more competent to interpret the FOIA than are the courts.

After the *Chrysler* decision, several courts applied a *de novo* standard of review in reverse FOIA cases, or at least recognized the validity of using this standard in some circumstances. For instance, in *Worthington Compressors, Inc. v. Costle*,¹⁰⁸ the District of Columbia Circuit Court of Appeals remanded a reverse FOIA action to the district court for a determination of material disputed facts which were not in the record and implicitly authorized the district court to conduct a *de novo* review, stating that "[t]he district court is free to proceed in whatever manner it finds appropriate"¹⁰⁹ The Fourth Circuit was more straightforward in approving the use of *de novo* review in reverse FOIA actions: "A failure of an agency to offer a fully reasoned basis for its decision . . . [to disclose] not only may invalidate an agency's decision but may become a basis for consideration by the district court of the propriety of *de novo* review under § 706(2)(F)."¹¹⁰

103. See Braeman, *Overview of FOIA Administration in Government*, 34 ADMIN. L. REV. 111, 112 (1982).

104. *Id.*

105. However, this argument has lost much of its force because many agencies have now established more thorough methods for evaluating submitters' confidentiality claims. See *supra* note 69. Agencies can develop more expertise in these disputes than can the courts because the agencies are more familiar with the actual needs of the industries they regulate, and because they handle more claims more frequently. Moreover, agencies are not interpreting the FOIA in general, but rather are determining the applicability of Exemption 4.

106. See 5 U.S.C. § 551(7) (1988) (defining an "adjudication" as an agency process for the formulation of an order).

107. See O'Reilly, *Confidence*, *supra* note 34, at 304.

108. 562 F.2d 45 (D.C. Cir. 1981).

109. *Id.* at 56.

110. *General Motors Corp. v. Marshall*, 654 F.2d 294, 300 (4th Cir. 1981) (emphasizing that *de novo* review is justified if material facts are in dispute; otherwise, the district court should review the action under the "in accordance

Thus, the lack of a meaningful record, the lack of any real agency expertise, and the support of some circuit court opinions all argue in favor of de novo review in reverse FOIA actions.

C. *Argument Against De Novo Review*

There are two fundamental reasons why many courts are reluctant to apply a de novo standard of review in reverse FOIA actions: first, the language and legislative history of the Act do not authorize it; and second, accepted judicial interpretations of the Administrative Procedure Act do not require it.

Despite the numerous recommendations favoring an amendment to the FOIA to include a right to de novo review of agency disclosure decisions,¹¹¹ every attempt to amend the Act has died in Congress.¹¹² Although business special interest groups might very well persuade Congress to amend the FOIA to grant a statutory right to a reverse FOIA action, at present there is no clear congressional desire to support de novo review. Perhaps one of the reasons that Congress has been reluctant to amend the FOIA is that despite the clamoring of business groups which claim frequent discretionary disclosures of information falling under Exemption 4, no hard evidence has ever been produced to indicate that such harmful disclosures actually occur.¹¹³ One commentator placed a notice in the *Federal Register* in 1980 requesting businesses to submit evidence of any instances in which an agency disclosed information over the business' objections and the business, in turn, suffered some harm. Only nineteen responses were submitted, and of these, only five could reasonably have been claimed to fall within Exemption 4 or the Trade Secrets Act.¹¹⁴

Courts have established limited instances in which de novo review of an administrative action is justified. First, if Congress expressly requires de novo review, then the courts will apply this standard.¹¹⁵ Second, the *Overton Park*¹¹⁶ test is frequently cited as a ground for applying de novo review. The test is met if (1) "the action is adjudicatory in nature and the agency factfinding procedures are inadequate,"¹¹⁷ or (2) "issues that were not before the agency are raised in a pro-

with law" standard of APA § 706(2)(A)). The district court in *Chrysler* conducted a de novo review, although the Supreme Court neglected to address this fact beyond noting that the Third Circuit Court of Appeals thought such a review was improper. *Chrysler Corp. v. Brown*, 441 U.S. 281, 289 (1979).

111. The most vociferous proponent is James O'Reilly, senior counsel of Procter & Gamble Corporation. See, e.g., O'Reilly, *Confidence*, *supra* note 34, at 311-13. See also Administrative Conference of the United States, Exemption (b)(4) of the Freedom of Information Act (Recommendation 82-1), 1 C.F.R. § 305.82-1 (1984), reprinted in ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, FEDERAL ADMINISTRATIVE PROCEDURE SOURCEBOOK, *supra* note 31, at 567-71.

112. See, e.g., Note, *Developments Under the Freedom of Information Act—1983*, 1984 DUKE L.J. 377, 379-85 (describing the Hatch Bill). But see Note, *Developments Under the Freedom of Information Act—1986*, 1987 DUKE L.J. 521, 534-37 (proposed amendment to allow de novo review of reverse FOIA suits passed House but died in Senate).

113. See Stevenson, *supra* note 11, at 252 ("evidence to substantiate allegations of the agency bias in favor of disclosure of business information has not been presented") (quoting H.R. REP. NO. 1382, 95th Cong., 2d Sess., at 61 (1978)). But see O'Reilly, *Confidence*, *supra* note 34, at 270-71.

114. *Id.* at 220.

115. See O'Reilly, *Confidence*, *supra* note 34, at 300.

116. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

117. *Id.* at 415.

ceeding to enforce nonadjudicatory agency action."¹¹⁸ The second prong is irrelevant in the reverse FOIA context because the agency's decision to disclose the information is "adjudicatory in nature."¹¹⁹

Some courts have applied the first prong in the reverse FOIA context to allow de novo review when the agency's factfinding procedures were inadequate.¹²⁰ The District of Columbia Circuit has held that the characteristics of adequate procedures are the following: (1) notice to the submitter of the request made under the FOIA; (2) ability to submit materials supporting their exemption claim to a first-level decision-maker; (3) the setting out of the agency's position by this decisionmaker; and (4) the opportunity to appeal the initial disclosure decision within the agency.¹²¹ The case involved an FOIA request from the National Organization for Women for affirmative action plans submitted to the Office of Federal Contract Compliance Programs (Compliance Office) by three major insurance companies.¹²² The Compliance Office was found to have disclosed the plans improperly because it failed to offer the companies adequate fact-finding procedures to assert their need for confidential treatment.¹²³ The court also observed that the procedures "must be severely defective" before a violation of this standard would be found.¹²⁴ A recent Fourth Circuit case favorably cited this test.¹²⁵ The Fourth Circuit stated, however, that its decision did not foreclose a party from de novo review of "the adequacy of the agency's factfinding process," in which the focus of the district court should be the implementation of the agency's procedure in a given case, not on "the agency's procedure in the abstract."¹²⁶ Both courts rejected earlier cases allowing de novo review in the reverse FOIA context when the evidence of confidentiality was insufficient on the administrative record,¹²⁷ finding that *Chrysler* had put the viability of these cases in doubt.¹²⁸

118. *Id.*

119. The APA draws a distinction between actions of agencies that are adjudications and those that are rulemakings. In general, rulemakings are quasi-legislative whereas adjudications are quasi-judicial. The distinction is often hard to draw. *See generally* 5 U.S.C. §§ 551(4)-(7), 553-557 (1988); *see also* *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 337 (D.C. Cir. 1989) (reverse FOIA actions are in the nature of informal adjudications).

120. *See* *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (authorizing de novo review under the APA only when the agency's fact-finding procedures are inadequate). *But see* K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29.09 (Supp. 1982) (noting that the Supreme Court's pronouncements in *Overton Park* and *Pitts* do not coincide with the Administrative Procedure Act's legislative history).

121. *See* *National Org. for Women v. Social Sec. Admin.*, 736 F.2d 727, 745-46 (D.C. Cir. 1984).

122. *Id.* at 729-30.

123. *Id.* at 740-41.

124. *Id.* at 745.

125. *See* *Acumenics Res. & Technology v. Department of Justice*, 843 F.2d 800 (4th Cir. 1988). *Acumenics* unsuccessfully sought to enjoin the Department of Justice from releasing pricing information that the company had submitted to the government as part of a pricing proposal. The Department of Justice contended that the information was not useful to competitors and had previously been released with *Acumenics*' knowledge. *Id.* at 803. The court, however, was careful to state that its holding was "confined to the facts of this case." *Id.* at 805 n.4.

126. *Id.* at 805 n.5.

127. *See* *Westinghouse Elec. Corp. v. Schlesinger*, 542 F.2d 1190 (4th Cir. 1976), *cert. denied*, 431 U.S. 924 (1977); *Charles River Park "A", Inc. v. Department of Hous. & Urban Dev.*, 519 F.2d 935 (D.C. Cir. 1975) (arguing for de novo review because this parallels the de novo right granted to requesters of information; *see supra* notes 27-30 and accompanying text).

128. *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1162 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 977 (1988); *Acumenics*, 843 F.2d at 804.

As noted earlier in this Comment,¹²⁹ several agencies have promulgated regulations that allow submitters to claim confidential treatment for the information they submit to that agency. These regulations are significant for three reasons. First, they provide submitters with a procedure for asserting their confidentiality claims at the agency level. The procedures adequately protect the submitters' procedural due process interests because the opportunity to comment occurs prior to disclosure¹³⁰ and the submitter has a reasonable amount of time to dispute an agency's disclosure decision.¹³¹ Allowing a submitter more time and additional procedural protection might even keep properly disclosable agency records from the public because the submitter could use such procedures as a delaying tactic: if the requester lacks the financial ability to pursue its request through all of the administrative and judicial proceedings available to the submitter, the submitter could delay disclosure indefinitely or even prevent disclosure. In short, given the broad prodisclosure policy of the FOIA,¹³² no court should find such regulations procedurally inadequate.

Second, these regulations are significant because the threshold issue—whether or not disclosure will result in competitive harm to the submitter or otherwise violate Exemption 4 or the Trade Secrets Act—is first determined at the agency level. Although this issue is both factual and legal,¹³³ agencies possess sufficient expertise and knowledge obtained from performing their regulatory functions that they are the best forum to decide this issue. Because the agencies are charged by Congress with regulation of specific subject areas, the agencies can best ascertain whether or not the contemplated disclosure is harmful with respect to standards and practices within the regulated area. Moreover, the agencies probably have dealt with the submitter, or others in analogous circumstances, many times in the past. The agencies can use this experience to assess the credibility of the submitters' claims to a degree beyond the ability of a court.

Last, these regulations are significant because the agencies' rationales for their disclosure decisions become a part of the agencies' records. One of the reasons justifying *de novo* review was the lack of adequate agency fact-finding procedures, which made judicial review impossible.¹³⁴ These regulations result in creation of a more complete agency record because they require the submitters to justify nondisclosure and the agencies to submit their rationale for disclosure. Judicial review upon an agency record is feasible, so *de novo* review is unnecessary.

Unless Congress chooses to amend the FOIA, courts cannot impose additional procedural requirements on agencies in the reverse FOIA context without the risk of

129. See *supra* note 69.

130. Postdisclosure hearings might be constitutionally inadequate because "the very act of disclosure would destroy the property interest." Connelly, *supra* note 2, at 246 n.189.

131. See *supra* note 69. Although the time frame within which submitters must assert their claims appears short, it is important to note that the agency has only 10 days before it is required to respond to the FOIA request. That is, the policy of the FOIA requires prompt responses.

132. *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979).

133. The factual portion includes the likelihood of competitive harm and the legal portion includes the proper interpretation by the agency of the standards for determining when Exemption 4 applies.

134. See *supra* note 128; see also *supra* notes 96–99 and accompanying text.

running afoul of the underlying policy of the FOIA—disclosure of agency records. Although liberal use of de novo review would serve the policy of protecting the confidentiality interests of submitters, the cost in terms of increased reverse FOIA suits cannot be ignored. It can be argued that the risk of having commercial information leaked to competitors is a reasonable cost of doing business with the government or of obtaining the protection of the country's business laws. Moreover, the predisclosure notification procedures established by many agencies appear to protect the submitters' confidentiality interests adequately even without de novo review. If nonexecutive agencies that have not yet promulgated such predisclosure procedures would at least follow the recommendations of the District of Columbia Circuit in *National Organization for Women v. Social Security Administration*,¹³⁵ an adequate agency record for meaningful judicial review would always exist. More importantly the risk of real economic harm to the submitters would disappear because of the opportunity, first for predisclosure objection at the agency level, and then for appeal to a federal district court.

V. CONCLUSION

An unfortunate consequence of the enactment of the FOIA is the risk to submitters of information to government agencies of having their trade secrets and commercial information put in the hands of their competitors. The actual threat is unclear, though some commentators have noted that the victims might not be aware of the disclosures or perhaps prefer not to publicize it because their stockholders might lose confidence in them.¹³⁶ At any rate, the perceived threat is sufficient justification for some reform because the alternative would be diminished cooperation by submitters with the agencies which need the information to accomplish their functions.

The strength of the District of Columbia Circuit's test is its encouragement of agency development of internal control mechanisms to address the interests of submitters. Such sophisticated procedures to address submitters' concerns before disclosure serve the interests of judicial economy by containing the dispute in the forum that is best able to evaluate the dispute—the agency. By refusing to apply an “unwarranted by the facts” test except in cases of clear abuse, the courts can discourage frivolous claims of confidentiality.

Paul M. Nick

135. 736 F.2d 727, 745–46 (D.C. Cir. 1984); see also *supra* text accompanying note 121.

136. See O'Reilly, *Confidence*, *supra* note 34, at 271; Stevenson, *supra* note 11, at 218.

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